

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.393 of 2004

Reserved on : August 2, 2007

Date of decision : August 7, 2007

Om Parkash	...Appellant.
Versus	
State of H.P.	...Respondent.

Coram

The Hon’ble Mr. Justice Surjit Singh, Judge.

The Hon’ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Appellant : Mr. N.K. Thakur, Advocate.

For the Respondent : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

Surjit Singh, Judge

Appellant is aggrieved by the judgment of the trial Court whereby he has been convicted of an offence under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985, and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, in default of payment of fine to undergo rigorous imprisonment for a further period of two years.

2. Allegations on which the appellant was charged and tried are as follows. On 1st November, 2002, PW-12 ASI Ravi Kumar accompanied by several police officials, including Constable Rajesh Kumar (PW-1), Constable Majid Mohammed (PW-2) and HC Krishan Lal (PW-6), had organised a *Naka* at Zero Point Goli on Chamba-Dalhousie Road. Around 10.30 p.m., a Maruti Van reached the site of

Whether reporters of the local papers may be allowed to see the judgment?

Naka. It was got stopped. It was being driven by PW-10 Ashok Kumar. Prakash Chand (PW-9) was also present in that van. When the documents of the vehicle were being checked, the appellant was seen coming from the side of village Chauhra. He was carrying a bag on his shoulder. On seeing the police, he became shaky and turned back. He tried to run away, but was apprehended by ASI Ravi Kumar (PW-12). From the conduct of the appellant ASI Ravi Kumar suspected that appellant must be carrying some narcotic drug and psychotropic substance in his bag. So, he informed him, in writing, as also orally, that it was intended to search his person and in case he so desired search could be arranged in presence of a Magistrate or a Gazetted Officer. Appellant consented to the search of his person by the ASI on the spot. Thereafter, the bag, which the appellant had with him, was searched, in the presence of PW-9 Prakash Chand and PW-10 Ashok Kumar. It was found to contain two packets wrapped in a bed-sheet. Each of the two packets contained *Charas*, which, on weighment, was found to be 4 kgs. Two samples, each weighing 25 grams, were separated. Samples and the bulk *Charas* alongwith the bag and the bed-sheet were made into three separate parcels and the parcels were sealed. Search and seizure memo was prepared. A written report of search and seizure was also prepared. It was addressed to the SHO for formally registering the case against the appellant, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act. PW-2 Majid Mohammed was deputed to carry the said report, which is Ex. PW-2/A, to Police Station, Dalhousie, for the registration of the case. Soon after the registration of the case, the SHO, Police Station Dalhousie, Inspector Khub Ram (PW-13) went to the spot. He conducted further investigation of the case. Case property, i.e., three sealed parcels,

containing the bulk *Charas* and the two samples, were produced before him by PW-12 ASI Ravi Kumar. Those three parcels were resealed by PW-13 Inspector Khub Ram with his own seal. All the three parcels were then deposited with PW-7 Subhash Chand, who was posted as Moharrar Head Constable during those days. One of the two samples was sent by this witness to chemical laboratory through Constable Kamal Kishore (PW-14) alongwith NCRB form, specimen impressions of the seal and copy of the search and seizure memo, vide Road Certificate No. 136 of 2002. The Chemical Examiner, per report Ex. PA, reported that the sample had 26.45 per cent resin and opined that the stuff contained contents of *Charas*.

3. PW-9 Prakash Chand and PW-10 Ashok Kumar did not support the prosecution version while in the witness box. PW-10 Ashok Kumar, the driver of the van, stated that when he reached the spot PW-9 Prakash Chand was already there and appellant was also there in the custody of the police and he was told by the police officials that *Charas* had been recovered from him. PW-9 Prakash Chand denied that he was present on the spot, leave alone testifying that he was travelling in the van of PW-10 Ashok Kumar. He stated that he was called to Police Post Banikhet at 8 a.m. on the next day, i.e., 2nd November, 2002, and made to sign certain papers, like search and seizure memo and other papers prepared during the course of the investigation.

4. However, PW-1 Constable Rajesh Kumar, PW-2 Constable Majid Mohammed, PW-6 HC Kishori Lal and PW-12 ASI Ravi Kumar stated with one voice that the appellant appeared from the side of village Chouhra carrying a bag on his shoulder and that when, on seeing the police, he tried to turn he was overpowered and

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thereafter option was given to him for the search of his person in the presence of a Magistrate or Gazetted Officer, but he expressed the desire to be searched on the spot and thereafter his bag was searched and two packets, each containing 2 kgs. *Charas*, wrapped in a bed-sheet were recovered from his bag. The Police produced in the Court the *Charas*, Ex. P-5, the bag Ex. P-3 and bed-sheet Ex. P-4 during the course of the trial.

5. Learned counsel for the appellant submitted that the two independent witnesses not only did not support the prosecution version but it also appeared from their testimony that they were truthful witnesses and the police officials had planted the *Charas* upon the appellant. The contention that the two independent witnesses are truthful witnesses merits outright rejection, because not only that they are contradicted by their statements made to the police, under Section 161 of the Code of Criminal Procedure, with which they were duly confronted and which have been proved by the Investigating Officer, but also for the reason that they have made statements contradictory to each other, in material particulars. PW-10 Ashok Kumar has stated that when he reached the spot at Goli, PW-9 Prakash Chand was already there, but Prakash Chand (PW-9) denies that he was on the spot. He has stated that he was called to the Police Post Banikhet, which is far away from the site of the *Naka*, at 8 a.m. on the next following day and made to sign documents like search and seizure memo.

6. Leaned counsel for the appellant then pointed out some contradictions in the testimony of the witnesses and urged that the contradictions made the entire prosecution version highly doubtful. The main contradiction, which he pointed out, pertains to the time at which

the report for the formal registration of the case was prepared by PW-12 Ravi Kumar and handed over to PW-2 Constable Majid Mohammed for being carried to the Police Station. PW-2 Constable Majid Mohammed stated that report Ex. PW-2/A was handed over to him at 10.30 p.m. but PW-12 ASI Ravi Kumar testified that he had sent the report Ex. PW-2/A at 12.30 a.m. At the foot of the report below the dated signature of PW-12 ASI Ravi Kumar, time is also written, which is 12.30 a.m. Since testimony of PW-12 Ravi Kumar is corroborated by the time recorded below his signature on the report, much significance need not be attached to the statement of PW-12 Majid Mohammed about the time at which the report was handed over to him. This is particularly so when the testimony of PW-12 ASI Ravi Kumar is fully corroborated by the testimony of the other witnesses, even though police officials, about the search and seizure of the *Charas* from the appellant. These other witnesses are PW-1 Rajesh Kumar and PW-6 HC Kishore Lal. There does not appear to be any reason for disbelieving the testimony of these witnesses.

7. Learned counsel for the appellant then submitted that there was unexplained delay in sending copy of the FIR to the concerned Judicial Magistrate. He submitted that FIR was recorded at 1.30 a.m. on 2nd November, 2002, per entry in Column No.3(b & c) of FIR Ex. PW-7/A but its copy was received by the Judicial Magistrate at 4.40 p.m., even though the distance between the Court and the Police Station is a few hundred metres. Mere delay in the receipt of the copy of the FIR by the Judicial Magistrate will not make the prosecution version doubtful, especially when no major contradiction in the testimony of the witnesses with regard to the search and seizure of *Charas* is there.

8. Next, it was contended that link evidence with regard to the sample analyzed by the Chemical Examiner and reported (vide report Ex. PA) to be *Charas* did not conclusively prove that the sample that was analyzed was the same as had been separated from the recovered stuff.

9. It was pointed out that even though MHC Subhash Chand (PW-7) testified that he had received the three parcels, including two sample parcels, from PW-13 Inspector Khub Ram, alongwith NCRB form, sample seals etc. and had sent one of the two samples alongwith NCRB form etc. to the chemical laboratory through Constable Kamal Kishore (PW-14) and PW-14 Kamal Kishore had also stated that a parcel with NCB form and specimen seal impression etc. was handed over to him by PW-7 MHC Subhash Chand and he carried the same to the chemical laboratory and delivered it alongwith the documents to the concerned official, PW-13 Inspector Khub Ram himself did not say that he had handed over the parcels, the NCB form and specimen seal impression etc. to the MHC. It is true that Inspector Khub Ram has not stated that he handed over the case property, NCB form and specimen impression of the seal etc. to the MHC, but this omission loses much of its significance, in view of the fact that the testimony of PW-7 MHC Subhash Chand that the parcels alongwith NCB form, specimen seal impression etc, had been deposited with him by PW-13 Inspector Khub Ram, was not challenged by the appellant, while cross-examining this witness. Furthermore, the witness appeared in the Court alongwith Register No.19 of *Malkhana* in which entries about case property are made. He testified that the entry regarding deposit of the case property, i.e. three parcels and other articles pertaining to this case by PW-13 Inspector Khub Ram was there in that register. The witness was not

cross-examined by the appellant by reference to the entry in the said Register nor was it suggested to the witness that there was no entry in the Register about the case property, NCB form, specimen impression etc. pertaining to this case in the said Register.

10. It was then submitted that no local witness had been associated, even though it had come in evidence that there was *Dhaba* of PW-11 Kulwant Singh near the site of *Naka* and some customers were also present at the *Dhaba*. It is true that Kulwant Singh (PW-11) or the customers, who were present at his *Dhaba*, were not associated but that does not mean that no local independent witness had been associated. PW-9 Prakash Chand is resident of village Goli or say the village where the *Naka* was organized.

11. However, from the evidence on record, we find that even though *Charas* was contained in two packets (2 kgs. in each packet), there is no evidence that the stuff of the two packets had been mixed before the samples were drawn. From the testimony of PW-1 Rajesh Kumar, it appears that two samples were taken from each of the two packets. The relevant portion of the statement of the witness reads as follows. "Each packet was containing 2 kgs of *Charas*. The samples were also obtained separately from each packet." Other witnesses, namely PW-6 Krishan Lal and PW-12 ASI Ravi Kumar, have stated that only two samples were taken, even though they say that two samples were taken from both the packets but they have not elaborated if each sample contained sample of the stuff from both the packets recovered from the appellant. It is quite likely that one sample was taken from one packet and the other from the other packet. Testimony of PW-1 Constable Rajesh Kumar indicates that separate samples were taken from the two packets. The inference is that either both the samples

had been taken from one packet or one of the two samples had been taken from one packet and the other from the second packet. If it is so, report Ex. PA of the Chemical Examiner to whom only one sample parcel was sent cannot be said to pertain to the stuff contained in both the packets recovered from the appellant, but only to one of them. Admittedly, both the packets contained 2 kgs stuff each. So, the appellant cannot be said to be in possession of more than 2 kgs. stuff.

12. As already noticed hereinabove, the Chemical Examiner, vide report Ex. PA, has reported that the stuff contained only 26.45 per cent resin. His final opinion is that the sample contained contents of *Charas*. He has not given any opinion as to what were the rest of the contents. A Division Bench of this Court, in *Dharam Pal versus State of Himachal Pradesh and another appeal (Criminal Appeal Nos.491 & 510 of 2003)*, decided on 15.5.2007, has held that only the resin content of the stuff is *Charas* and that in the absence of the report of the Chemical Examiner about the rest of the contents of the stuff, the quantity of the *Charas*, based on the percentage of the resin found therein by the Chemical Examiner, is required to be worked out and the appellant-accused is to be held responsible for possessing *Charas* only to the extent, the stuff contains the resin.

13. As noticed hereinabove, the total quantity of stuff recovered from the appellant is to be taken to be 2 kgs. The Chemical Examiner has found resin content in it to the extent of 26.45 per cent. That means the *Charas*/resin content in the recovered stuff was 529 grams. This quantity is less than the commercial quantity, as specified vide Notification No. S.O. 1055(E), dated 19th October, 2001, issued by the Central Government, even though more than the upper limit of the small quantity fixed by the same Notification. Thus, the appellant is

liable to be punished not under Section 20(C) of the Narcotic Drugs and Psychotropic Substances Act, as done by the trial Court, but under Section 20(B) of the said Act for which no minimum sentence is prescribed. The offence under Section 20(B) is punishable with imprisonment that may extend to ten years and with fine which may extend to Rs.1,00,000/-. Looking to the quantity of resin/*Charas* found in the stuff recovered from the appellant, we feel that the ends of justice would be met in case his sentence is reduced from ten years rigorous imprisonment and a fine of Rs.1,00,000/- to four years rigorous imprisonment and a fine of Rs.20,000/-, in default of payment of fine simple imprisonment for a further period of six months. We order accordingly.

14. The appellant has been in custody since 1.11.2002. Thus, he has been in detention for a period longer than the sentence of substantive imprisonment as reduced by this Court hereinabove. In fact he has undergone imprisonment for a period more than the term of substantive imprisonment, as reduced hereby plus the imprisonment awarded in default of payment of fine. Therefore, it is ordered that he be set at liberty forthwith, in case his detention is not required in any other case.

15. Appeal stands disposed of.

(Surjit Singh), J

August 7, 2007_(sd)

(Surinder Singh), J